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EXAMINER

JACKSON, MONIQUE R

ART UNIT PAPER NUMBER

1773

DATE MAILED: 09/18/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

10/083,110

Applicant(s)

JUD ET AL.

Examiner

Monique R Jackson

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--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 25 June 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) ☐ they raise the issue of new matter (see Note below);
 - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____

3. ☒ Applicant's reply has overcome the following rejection(s): See attached.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See attached.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: None.Claim(s) objected to: None.Claim(s) rejected: 30-48.Claim(s) withdrawn from consideration: None.

8. ☐ The proposed drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____
10. ☒ Other: Note the attached PTO-892.

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ADVISORY ACTION

Continuation of Item No. 3. The Applicant's reply and claim amendments have overcome the following rejections:

a. The rejection under 35 U.S.C. 112, second paragraph, as recited in Paragraph 5 of the prior office action.

b. The rejection under 35 U.S.C. 103(a) over Breitler et al in view of Ullmann's as recited in paragraph 9 has been withdrawn given that the secondary reference *Ullmann's* was provided as supporting evidence and not as a secondary reference to combine with Breitler et al to produce the Applicant's invention given that Breitler et al alone reads upon the claims recited. Hence, to avoid confusion, the Examiner withdraws the obviousness rejection.

b. The rejection under 35 U.S.C. 103(a) over Breitler in view of Abrams as recited in paragraph 10 has been withdrawn given that the print and/or lacquer layer limitation is an alternative first functional material to the polyolefin first functional layer wherein the teachings of Breitler meet the limitation of a polyolefin first functional layer. The Examiner notes that the rejection was presented to speed prosecution in the event that the Applicant further limited the first functional layer to print and/or lacquer layer(s) only. Hence, to avoid confusion, the Examiner withdraws the obviousness rejection.

Continuation of Item No. 5. NOTE: The Applicant's arguments filed 6/25/03 have been considered but for the most part, are not persuasive. First it is noted that upon review, the obviousness rejection recited in paragraph 8 of the prior office action based on Migliorini et al incorrectly incorporated the previously rejected claims 30, 34 and 38, given that Migliorini et al

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alone reads upon the limitation of these claims. As evident from lines 4-5 of the paragraph, the combination of Migliorini et al in view of Breitler et al is directed to the instantly claimed properties of the metal foil and hence Claims 39-45.

With regards to Applicant's arguments of the rejections presented in paragraphs 6-8 and 11-13, the Examiner has made an attempt below to summarize the Applicant's main arguments with regards to the three primary references below:

A. Migliorini et al as primary in paragraphs 6 and 8 -

- 1) The term polypropylene does not include propylene copolymers or modified polypropylene
- 2) Reference allegedly does not teach a coextruded polyamide layer/polypropylene layer
- 3) "Consisting of" language in the instant claims excludes an additional layer in the plastic film

B. Breitler et al as primary in paragraph 7 -

- 1) Reference allegedly does not teach a polypropylene layer between the metal layer and the polyamide layer wherein the Examiner's interpretation that a polypropylene layer is on the inner side of the polyamide layer is merely speculation and not based on facts

C. Ohkuti et al as primary in paragraph 11-13

- 1) Reference provides various thermoplastics to chose from and hence the group to select from is very large and allegedly would not lead one to the Applicant's invention
- 2) Instant invention allegedly provides unexpected results and hence would overcome a prima facie case of obviousness

In reply, the Examiner offers the following rebuttal.

A. Migliorini et al -

- 1) The term "polypropylene" as recognized in the art does in fact encompasses copolymers and hence that is why those skilled in the art utilize the term "polypropylene homopolymers" to clearly specify that the polypropylene is formed only from propylene monomers, as offers the

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following references as support (Genske et al, USPN 4,764,404, Col. 7, lines 14-35 and 52-53; Mizutani, USPN 4,486,497, Col. 3, lines 20-53; Liu, USPN 4,378,404, Col. 2, lines 5-18; Stead et al, USPN 4,297,408, Col. 1, line 28-Col. 2, line 32; Eustance et al, USPN 4,243,798, Col. 12, lines 21-29; Jud et al, USPN 6,405,896, Col. 3, lines 14-30.) Further, a modified polypropylene is a polypropylene by the mere recitation of the term. Therefore, considering the Applicant did not define the term "polypropylene" to be limited to polypropylene homopolymers only, the Examiner takes the position that the claim limitation "polypropylene" as accepted in the art would in fact encompass not only polypropylene homopolymers but also polypropylene copolymers and modified polypropylene.

2) With regards to coextrusion, it is noted that the reference must be taken as a whole and as such does in fact teach that the film of the invention may be produced by coextrusion particularly as described in the example.

3) Applicant's arguments regarding the term "consisting of" have been considered however it is noted that the instant claims recite: "A sterilizable composite film...**comprising**...having a layer structure containing one on top of the other:...c) a second functional layer that is a second plastic film **comprising** a film consisting of" (emphasis added). Hence contrary to the Applicant's arguments, the film of the instant invention may include other films and/or layers in addition to the polyamide/polypropylene extrudate in the second functional layer.

Hence, the Examiner maintains her position with regards to the rejections recited in paragraphs 6 and 8.

B. Breitler et al

1) The Examiner believes the Applicant's current arguments with regards to Breitler et al are based on the same premise as the Applicant's previous arguments – whether the Examiner has properly interpreted the teachings of Breitler et al in Column 4 of the reference. In response to Applicant's current arguments, the Examiner first refers the Applicant to the previous rebuttal as clearly recited in the prior office action and further notes that the Examiner's interpretation is NOT merely speculation but based on facts and a clear reading of the text as previously recited. The Examiner notes that a reference (Muggli) was further provided to show that the Examiner's interpretation was in fact consistent with the art. Hence, the Examiner maintains that upon a

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clear reading of Breitler et al one skilled in the art would interpret Column 4 to teach that a sealable or polypropylene layer could be provided on either or both sides of each polyamide layer. Hence, the Examiner maintains her position with regards to the rejection recited in paragraph 7.

C. Ohtsuki et al –

1) It is first noted that Ohtsuki et al do teach that the thermoplastic film may be a single resin film produced from polyamide or polyolefins such as polypropylene, polyethylene and polybutene or a composite film produced therefrom by coextrusion. Ohtsuki et al also teach that the thermoplastic may be polyamide, polyolefins (eg. PE, PP, EP, PB), polyester, polyvinyl chloride, polyvinylidene chloride, polybutadiene, polycarbonate, ethylene-vinyl acetate, or polyvinyl alcohol. Hence, the group of thermoplastic materials for the coextruded composite totals nine thermoplastics wherein a coextrusion of any two thermoplastic material listed would give a selection group of approximately 36, for a total of 144 based on the four polyolefins. Though a group of 144 is not a very large number for it to be obvious to one skilled in the art to select one element from the group, the Examiner further notes that the statements at Col. 3, lines 27-31 of Ohtsuki et al would guide one skilled in the art to select from polyolefins and polyamides as being preferred thermoplastics.

2) With regards to Applicant's alleged showing of unexpected results, the Examiner is unclear as to what data the Applicant is relying upon as a showing of unexpected results in order to overcome the obviousness rejection given that there does not appear to be a clear showing of unexpected results on the record.

Hence, the Examiner maintains her position with regards to the rejections recited in paragraphs 11-13.

Lastly, with regards to Migliorini et al in view of Breitler, in response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in


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the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Migliorini et al teach a metallized composite film comprising a generic aluminum layer but do not teach that the aluminum layer is an aluminum foil having the instantly claimed features of purity. However, it is noted that aluminum having the claimed purity is preferable in the art in terms of metal/plastic packaging materials wherein a foil of aluminum or aluminum alloy as instantly claimed is preferred as taught by Breitler et al. Hence, the question is whether one skilled in the art would have been motivated to utilize an aluminum foil layer taught by Breitler et al in place of the aluminum metallized layer in the invention taught by Migliorini et al. The Examiner maintains her position that it would have been obvious given that a metallized layer and a metal foil are known functional equivalents in terms of a gas barrier material in a packaging film wherein the barrier properties are a function of the thickness of the metal layer. Therefore, it would have been obvious to one skilled in the art to utilize any species of aluminum barrier layer in the invention taught by Migliorini et al wherein Breitler et al teach that the instantly claimed species is an obvious species utilized in the packaging art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Monique R Jackson whose telephone number is 703-308-0428. The examiner can normally be reached on Mondays-Thursdays, 8:00AM-4:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Paul J Thibodeau can be reached on 703-308-2367. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.


Technology Center 1700
September 8, 2003

MONIQUE R. JACKSON
PRIMARY EXAMINER